

Our ref: DGC11/629

Your ref: 2010/08494

12 MAY 2011

Mr Phil Clarke
Queensland Ombudsman
GPO Box 3314
Brisbane QLD 4000

Dear Mr Clarke

I refer to the letter of 29 April 2011 (received on 5 May 2011) from the Assistant Ombudsman, [REDACTED] about Proposed Opinion 40 in your Proposed Report titled *Brisbane Airport Link Report: An investigation into complaints about night-time surface work* (Proposed Report).

[REDACTED] has confirmed that part of your Proposed Opinion 40 is that the Coordinator-General's failure to give instructions to the then Department of Infrastructure and Planning's (DIP) Compliance Unit and the Department of Environment and Resource Management (DERM) about environmental coordination issues arising from the Airport Link project is unreasonable in light of the Coordinator-General's environmental coordination role.

I have been invited to provide further information about "detailed instructions" given by the Coordinator-General to the Compliance Unit and to DERM about the coordination of the regulation of noise from night-time surface works.

I have sought comments from the former Coordinator-General, Mr Colin Jensen, to assist me to provide further information about Proposed Opinion 40 and because Proposed Opinion 40 makes an adverse comment about his conduct as Coordinator-General.

Role of the Coordinator-General

I refer to the submission dated February 2011 made by the Coordinator-General and DIP in response to the Proposed Report. In respect of Proposed Opinion 40, no submission was made that the Coordinator-General gave “detailed instructions” to the Compliance Unit (or to DERM). To the contrary, while the Coordinator-General certainly did provide instructions to the Compliance Unit, it is not reasonable to expect that the Coordinator-General himself should provide detailed instructions on these matters. [REDACTED] correspondence suggests that the Coordinator-General himself should undertake a “hands on” role in respect of the day to day coordination of the regulation of noise from night-time surface works and accordingly, that the Coordinator-General himself should provide detailed instructions to the Compliance Unit and to DERM about such matters. This suggestion is flawed and fails to recognise the way in which an agency such as the Coordinator-General must (and does) operate to ensure good public administration.

The Coordinator-General was, and continues to be, actively involved in the enforcement of compliance with the conditions imposed by the Coordinator-General on the Airport Link project. However, the Coordinator-General currently has another 25 significant projects which are undergoing the environmental impact statement process and has imposed conditions in evaluation reports and change reports for 23 other significant projects since the issuing of the Change Report for the Airport Link project in July 2008. This is in addition to his other statutory roles which include the implementation and management of State development areas, the acquisition of land and the coordination and facilitation of major infrastructure projects across a range of areas from road tunnels and railways to LNG and electricity transmission.

Given the complexity of the Airport Link project and the impacts it has created, the previous Coordinators-General and I have taken a close interest in the project and have been proactive in visiting the work sites, asking questions, seeking technical and legal advices and, based on these, issuing instructions to the Compliance Unit. This was in addition to instructions given in response to specific issues brought to the Coordinator-General's attention by the Compliance Unit or complaints received directly by the Coordinator-General.

The Coordinator-General has also delegated all his powers and functions to his Deputy Coordinators-General (other than the powers to delegate and to hold an inquiry)¹ to enable the good administration and efficient functioning of the Office of the Coordinator-General. In the case of the Airport Link project, the Deputy Coordinator-General (Infrastructure and Land) also provides instructions to the Compliance Unit about the coordination of the regulation of noise from night-time surface works and has done so throughout the project. It is appropriate for the Coordinator-General to delegate his powers and functions to avoid the development of a “bottleneck” in the decision-making process.²

¹ Pursuant to s.11 of the *State Development and Public Works Organisation Act 1971*.

² See Queensland Ombudsman, *Tips and Traps for Regulators*, Second Edition (October 2009), p 49.

The instructions given by the Coordinator-General and his Deputy Coordinators-General are given in many forms including by email, briefing notes, in meetings, over the telephone, and on site visits. It is not feasible, within the limited time frame, to produce particulars of all of these communications. In any event, it is not possible to produce evidence of "detailed instructions" as this is not how the Office of the Coordinator-General, or indeed any busy Government agency, operates. However, I have outlined below³ examples of circumstances where instructions were provided by the Coordinator-General or the Deputy Coordinators-General.

It is also my view that, in the case of compliance activities, it is not necessary for the Coordinator-General to provide the Compliance Unit and DERM with ongoing detailed instructions about the coordination of the regulation of noise from night-time surface works because the Coordinator-General has provided the Compliance Unit and DERM the authority to deal with these matters without such instruction. I also question whether it is appropriate for the Coordinator-General to provide detailed instructions to DERM about noise in the context of the jurisdiction granted to DERM and DERM's expertise and role under the *Environmental Protection Act 1994*.

Role of the Compliance Unit

The guiding document for the Compliance Unit is the DIP Strategic Compliance Plan, approved by the Coordinator-General and publicly available on the internet. This document outlines how compliance activities are to be undertaken on behalf of the Coordinator-General under the *State Development and Public Works Organisation Act 1971* (SDPWO Act).

The Strategic Compliance Plan states the Compliance Unit's primary role is to evaluate a proponent's compliance with conditions imposed by the Coordinator-General and ensure that any non-compliance is addressed appropriately through education, remediation and/or enforcement action. It also states the Compliance Unit:

- will review third-party audit reports and may make recommendations to the Coordinator-General if any further action is considered necessary; and
- may undertake monitoring or auditing of a project's activities as a result of the findings of an audit report or as part of a random or targeted audit program.

The Strategic Compliance Plan therefore provides a framework for compliance which enables the Compliance Unit to undertake a range of activities to support the coordination of the regulation of noise from night-time surface works without the need for ongoing detailed instructions from the Coordinator-General. In undertaking these activities, the Compliance Unit liaised with DERM about the regulation of noise from night-time surface works.

Role of DERM

Pursuant to section 54B(3) of the SDPWO Act, the Coordinator-General granted DERM⁴ jurisdiction for condition 9.

³ See below under heading "Instructions given by the Coordinator-General".

⁴ The grant of jurisdiction was originally made to the then Environmental Protection Agency.

In my view, the nomination by the Coordinator-General of an entity to have jurisdiction for an imposed condition under section 54B(3) of the SDPWO Act allows the nominated entity to use its discretion, expertise and judgment as to the regulation of compliance with that condition.

By nominating an entity with the relevant experience and resources to have jurisdiction for a condition, the Coordinator-General is exercising his environmental coordination role. I do not consider this role requires the Coordinator-General to provide ongoing detailed instructions to a nominated entity as to how it manages the regulation of compliance with a condition. The Coordinator-General retains jurisdiction for such a condition and has a coordination role. The Coordinator-General will provide guidance to a nominated entity about compliance matters where the Coordinator-General feels that it is necessary in a particular situation. The Coordinator-General also will consult with the nominated entity about the coordination of compliance actions taken by the Coordinator-General and the nominated entity in relation to the condition.

In the case of the Airport Link project, only the Coordinator-General has jurisdiction for condition 7 and DERM has been nominated as the entity with jurisdiction for condition 9. The Coordinator-General also has a coordination role in respect of the monitoring of noise from the Airport Link project.

In addition to the jurisdiction granted to DERM for condition 9, DERM has jurisdiction independent of this under the *Environmental Protection Act 1994* in respect of environmental nuisance. DERM has the expertise and resources to ensure compliance with noise conditions and for this reason was given jurisdiction for condition 9. It would not be appropriate for the Coordinator-General to interfere with these functions of DERM by giving detailed ongoing instructions to DERM about the regulation of noise from night time surface works.

I have accepted your Proposed Recommendation 21 that for future significant projects where there is joint regulatory responsibility between the Coordinator-General and another agency, the Coordinator-General have appropriate arrangements in place identifying which agency is the lead agency for specified categories of cases and the responsibilities of the lead agency and partner agencies. Under such arrangements, if DERM is the lead agency, I would not expect to give detailed instructions to DERM about the regulation of noise as this would defeat the purpose of appointing DERM the lead agency. However, I would continue to have a coordination role, through the Compliance Unit, in regulating noise from night time surface works.

Instructions given by the Coordinator-General

I consider that from time to time during the construction of the Airport Link project, the Compliance Unit has received instructions from the Coordinator-General or his delegate about the regulation of noise created by night-time surface works when they considered it necessary.

I outline some examples below. These are, of course, not exhaustive.

Kalinga Park worksite – Independent noise monitoring

Following a number of complaints to the Coordinator-General, DIP, BrisConnections and TJH about night-time noise from the Kalinga Park worksite, in January 2010, the Coordinator-General issued instructions to the Compliance Unit to commission independent noise monitoring at the worksite and to prepare a letter to BrisConnections and Thiess John Holland (TJH) to inform them this was occurring.⁵

The Compliance Unit subsequently engaged Heggies Pty Ltd to undertake noise monitoring and analysis for the purpose of determining the level of compliance by TJH at the Kalinga Park worksite with the noise goals in condition 9.

Attachment 1 contains a copy of the letter issued. The Ombudsman has already been provided with a copy of the Heggies Pty Ltd report.

Wooloowin worksite – Works (to free auger) after 6.30 pm and failure to close gates of acoustic fence

In January 2010, two incidents occurred at the Wooloowin worksite:

- work continued to be undertaken after the designated finish time of 6.30 pm in order to attempt to free an auger which had become trapped in concrete during piling and
- an officer of the Compliance Unit noted that the gates forming part of the acoustic fence were being kept continuously open.

An investigation of these incidents was undertaken and advices provided to the Coordinator-General. The Coordinator-General, following consideration of the advices and the recommendations of the Compliance Unit, formed the preliminary view that there was likely to have been a contravention of conditions, and instructed the Compliance Unit to issue letters to BrisConnections and TJH requiring them to show cause why enforcement proceedings should not be commenced.

Attachment 2 contains copies of the letters issued.

Clarification of term “excessive noise” in condition 7(b)

Following the provision of the six-monthly Davis Langdon Construction Compliance Report by City North Infrastructure Pty Ltd (CNI) in April 2010, the Coordinator-General issued instructions to the Compliance Unit requesting advice in relation to clarification of the definition of “excessive noise” in condition 7(b). The Compliance Unit subsequently prepared a briefing note and recommended that the Coordinator-General issue a letter to TJH which clarified the Coordinator-General’s view of the term “excessive noise”. The Coordinator-General also issued instructions to send a letter to the Community Liaison Groups about the clarification of “excessive noise” (with Director-level sign off) and to post the clarification on DIP’s website.

Documents in relation to the instructions provided and the letters issued were provided in the Coordinator-General’s letter to the Acting Ombudsman of 8 October 2010.

⁵ It should be noted that previous independent monitoring had been undertaken at the Kalinga Park worksite in late 2009 by entities engaged by TJH and CNI.

Removal of temporary noise wall at [REDACTED], Kedron

A complaint was made to CNI by a resident of [REDACTED] in February 2010 that a temporary noise wall (shipping container) had been removed from behind his property and that nothing had been put in its place to protect the resident from construction noise. This matter was referred to the Coordinator-General by CNI as a possible breach of the imposed conditions.

Following the receipt of advice about the complaint, the Coordinator-General formed the preliminary view that there was likely to have been a non-compliance with conditions, and instructed that a letter be issued to BrisConnections and TJH requiring them to show cause why enforcement proceedings should not be commenced in relation to the removal of the temporary noise wall and the subsequent recording of noise levels above the noise goals without mitigation being provided.

The temporary noise wall was promptly reinstated by TJH.

Following consideration of TJH's response to the show cause letter, the Coordinator-General also instructed that an additional letter be issued requesting a further explanation in relation to certain matters and information in relation to the steps taken to prevent the recurrence of such an incident and measures adopted when noise goals are exceeded.

Attachment 3 contains copies of the letters issued.

Wooloowin worksite - Shotcrete deliveries at night

Between 23 September 2010 and 10 October 2010, TJH exceeded the limit of four shotcrete deliveries per night to the Wooloowin worksite between the hours of 6.30 pm and 6.30 am, contravening the conditions set by the Coordinator-General for the project.

TJH and BrisConnections did not report these exceedences under the reporting requirements set by the Coordinator-General for the project.

An investigation of these incidents was undertaken and advices provided to the Coordinator-General. Following consideration of the information, the Coordinator-General formed the preliminary view that there was likely to have been a contravention of conditions, and instructed that letters be issued to BrisConnections and TJH requiring them to show cause why enforcement proceedings should not be commenced. Following a response from BrisConnections and TJH that the incidents were justified on safety grounds, the Coordinator-General further instructed that additional letters be issued to BrisConnections and TJH seeking further detailed information and evidence concerning their assertions.

Following detailed consideration of the matter, including representations by TJH of mitigating circumstances and detailed technical [REDACTED] advices obtained by the [REDACTED]

[REDACTED] Consequently, the Coordinator-General instructed and approved the issue of enforcement notices to BrisConnections and TJH.

The issue of these enforcement notices were the second time⁶ such notices had been issued under section 157B of the SDPWO Act, since the powers were inserted in the Act in December 2008 and involved considerable time and resources.

Attachment 4 contains copies of the:

- show cause letters
- letters to BrisConnections and TJH seeking further information and
- enforcement notices (incorporating detailed statement of reasons for the decision to issue the notice).

Kalinga Park East worksite – Jacked box works

I have recently issued instructions about the action to be taken in relation to the jacked box works at the Kalinga Park East worksite. These works involve the jacking of two concrete boxes under the North Coast Railway Line and were due to commence in the week preceding the Easter and Anzac Day public holiday period and planned to be conducted 24 hours a day, seven days a week.

Following being informed about the works, I sent a letter to BrisConnections noting my concern about the scheduling of the works over the public holiday period. After considering BrisConnections response [REDACTED] I instructed that a further letter be prepared which set out my views in relation to the conditions applying to the works and requesting reprogramming of the works over the public holiday period. **Attachment 5** contains a copy of the letters issued. This action was taken by me in coordination with DERM which issued a notice under section 451 of the *Environmental Protection Act 1994* to TJH for information in relation to the works. TJH's response to the section 451 notice was shared by DERM with the Compliance Unit and assisted to inform my views.

Following this action, extensive noise monitoring by DERM (independent of TJH) was undertaken during the public holiday period and BrisConnections provided additional advice on mitigation measures being undertaken to manage noise. BrisConnections also provided an assurance that the demolition of the headwall would not be undertaken in the period prior to the planned dawn services and until after 12 noon on Anzac Day.

Conclusion

Proposed Opinion 40 suggests the Coordinator-General was not aware of and/or not kept informed of the issues arising from the project and consequently did not provide instructions to the Compliance Unit. As already noted in the submission dated February 2011, this suggestion is inaccurate and does not represent the actual circumstances.

⁶ The Coordinator-General first issued enforcement notices under section 157B of the SDPWO Act in October 2010. These notices issued, on instructions and approval by the Coordinator-General, relate to the project and require BrisConnections and TJH to only transport spoil by road using permitted haulage routes.

The Proposed Report indicates that during the course of the investigation, Ombudsman investigators considered the comments of officers of the Coordinator-General and DIP made in a preliminary meeting and in interviews and documentation provided by the Coordinator-General and DIP (including documents from the Compliance Unit and Legal Services' files). It also indicates that Ombudsman investigators attended DIP to inspect electronic and hard copy files. I find it difficult to understand how Proposed Opinion 40 can reasonably and justly be formed on the information which was accessible through this process.

As the submission dated February 2011 and this letter also show, the fact is that the Compliance Unit and the Coordinator-General have been, and continue to be, actively involved in the coordination of the regulation of noise from night-time surface works, as well as other environmental coordination issues arising on the Airport Link project. A conclusion that this is not the case (and consequently, that a failure to take such action is unreasonable), in my view, does not fairly represent the circumstances and is not reasonably open to be made.

I again respectfully request that you remove Proposed Opinion 40 from your final report.

If you require any further information, please contact [REDACTED] Director, Infrastructure Projects, Infrastructure and Land Group, Office of the Coordinator-General, Department of Employment, Economic Development and Innovation, on [REDACTED]

Yours sincerely



Keith Davies
Coordinator-General

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